

FACT SHEET
OCTOBER 2000

Land Use Covenant Agreements



LUC AGREEMENTS IN CALIFORNIA



**California
Environmental
Protection Agency**



**DEPARTMENT OF TOXIC
SUBSTANCES CONTROL**

*It is DTSC's mission
to protect public
health and the
environment from
harmful exposure
to hazardous
substances.*

INTRODUCTION

In 1987, the California Environmental Protection Agency, Department of Toxic Substances Control (DTSC) developed policy recommending the use of Land Use Covenants (LUC Agreements) to protect the public from unsafe exposures to hazardous substances remaining in place on public or private property during or after completion of cleanup of contaminated sites. DTSC's use of LUC Agreements is based on statutory authority in the California Health and Safety Code (chapters 6.5, 6.8 and 6.85) and the California Civil Code, Section 1471, which allows a nonowner of property to enter into an environmental restriction (e.g., LUC Agreement) due to the presence of hazardous materials. This fact sheet explains how the environmental cleanup process, which includes selection of a remedy and cleanup levels, is related to identification of institutional controls and LUC Agreements, and gives a brief overview of how these LUC Agreements are utilized in California.

WHAT IS DTSC'S ROLE IN CLEANUP AND CORRECTIVE ACTION AT CONTAMINATED SITES?

Existing law in the Government Code and the Health and Safety Code requires that DTSC prepare or approve remedial action plans for each site listed as a hazardous substance release site on the state Superfund list. For sites where there has been a release or



threatened release of a hazardous substance into the environment, a "remedial action plan" or similar decision document must be approved by DTSC to certify that the remedy selection process was carried out in accordance with all applicable laws and regulations, and to provide a public source of information about the history, characteristics, and risks posed by the site conditions, as well as a summary of the cleanup alternatives considered, their evaluation, and the rationale behind the selected remedy. DTSC must determine whether or not the selected cleanup levels and remedies meet all legal requirements and protect public health and the environment. When the cleanup process has been completed, DTSC has statutory responsibility for certification that the necessary remediation has been taken and that no further remedial action is necessary. At such time, DTSC may delist the site from the state Superfund list.

WHAT ARE INSTITUTIONAL CONTROLS (ICs)?

Under federal and state laws (the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA)), institutional controls are considered “remedies”. As such, institutional controls (ICs) are selected cleanup actions to stop or reduce a release or threatened release of hazardous substances to the environment. ICs are also utilized as remedies under corrective action or closure of facilities permitted for hazardous waste management activities, including treatment, storage, and disposal. ICs are non-engineering mechanisms to restrict activities and site access; they limit exposure pathways of human and environmental receptors to prevent exposure to contamination.

ICs may also supplement treatment remedies, and ensure that engineering controls, such as landfill caps, maintain their integrity and effectiveness. Where contamination remains in place, examples of ICs include land use covenants, as well as public notice, signs, and fencing.

WHY DOES DTSC REQUIRE LUC AGREEMENTS?

ICs are necessary to protect sensitive individuals from exposure to residual hazardous substances, where future land or water uses may not be compatible with contamination. For sites requiring ICs, DTSC policy requires that the property owner enter into a LUC Agreement to ensure that the state will have authority to implement, monitor and enforce protective restrictions. DTSC may also require LUC Agreements as a condition for approval of permits, closures, and post-closure permits for treatment, storage, and disposal facilities, or following completion of corrective action at solid waste management units. Finally, DTSC may require LUC Agreements pursuant to Border Zone and/or Hazardous Waste Property Determinations in accordance with state law.

DTSC is currently developing a new regulation to combine different existing statutory requirements for execution and recording of LUC Agreements



when hazardous materials, hazardous wastes, or hazardous substances will remain on property at levels which are not suitable for unrestricted use of the land. The proposed regulation will be posted on DTSC's website, and a public workshop will be held prior to filing of the draft regulation with the Office of Administrative Law.

WHAT ARE LUC AGREEMENTS? WHAT PURPOSES DO THEY SERVE?

LUC Agreements are proprietary controls, agreed to by property owners, to implement ICs at sites where there has been a release of hazardous substances, and where some wastes will remain in place. The LUC Agreements allow ongoing use of property as long as the cleanup remedy is not compromised by current or future development. Restrictions identified in LUC Agreements apply to affected areas, and should be no more restrictive than needed to protect public health and the environment. At large sites, restrictions may not be required for the entire site, but rather may apply to delineated areas of contamination. As specified in the LUC Agreement, restrictions “run with the land” and bind current and future landowners.

LUC Agreements are intended to protect public health and the environment by: 1) preventing inappropriate land use, 2) increasing the probability that the public will have information about residual contamination, 3) disclosing information for real estate transactions about residual contamination, 4) ensuring that long-term mitigation measures are carried out by protecting the engineering controls and remedy; and 5) ensuring that subsequent owners assume responsibility for preventing exposure to contamination.

WHEN ARE LUC AGREEMENTS DEVELOPED?

LUC Agreements must be recorded by completion of remediation activities. However, the LUC Agreement is based upon institutional controls that

must be identified in a decision document, e.g., Remedial Action Plan, Record of Decision, Removal Action Workplan, Permit, Closure Plan, Post-Closure Plan, Corrective Measures Study, Hazardous Waste Property or Border Zone Property Determination. Each decision document should reference the exposure scenario used to select the remedy, including the assumptions made concerning current and reasonably anticipated future land use, and specify the uses that may be prohibited or restricted.

WHERE ARE LUC AGREEMENTS RECORDED?

The LUC Agreements are recorded in local real property records kept by the County recorder. They are binding on current and subsequent property owners and remain in effect until they are formally removed or modified. To date, DTSC has entered into [more than 135 LUC Agreements](#) statewide, most of which are at privately owned industrial-use sites. However, DTSC's policies and procedures for LUC Agreements also apply at open and closing military bases. After all other actions have been taken, and when the LUC Agreement has been recorded, DTSC can approve final site certification and Superfund delisting.

SHOULD CLEANUP LEVELS BE SET TO ACCOMMODATE UNRESTRICTED USES?

Remedy selection requires evaluation of reasonably anticipated future land uses, which affect exposure pathways that are evaluated in the risk assessment. For private properties, local government will normally be the source of information about anticipated land uses. In cases where the future land use is relatively certain, the remedial action objective must reflect such land use. Conversely, where the future land use is less certain, a range of uses should be considered. Selection of cleanup levels must be based on consideration of public health and environmental risk, technical and cost limitations, and the performance and risk uncertainties inherent in all waste remediation efforts. Where the anticipated land use is for

residential uses, such as schools or hospitals for sensitive populations, the cleanup levels DTSC must set will necessarily be more protective. Cleanup levels at industrial or recreational sites are generally less stringent because of shorter human exposure durations and limited exposure pathways.

Some properties may not be remediated for unrestricted uses due to the extent and nature of contamination, high costs of cleanup, or technical infeasibility. Although these properties will need institutional controls to protect against future exposures, the properties may still be used productively. For example, it may not be possible to clean up a large landfill to unrestricted future land use. Although not suitable for housing, schools, or hospitals, some landfill properties have been redeveloped as golf courses, botanical gardens, parks, ecological reserves, or have been capped by roadways or industrial/commercial centers. Such redevelopment depends on site-specific conditions and use of institutional and engineering controls.

When selecting a remedy for a site, State and Federal laws require that:

- a) the chosen remedy must protect public health and the environment for the reasonably, anticipated future land use;
- b) engineering controls must be used for low-level threats;
- c) institutional controls must be used to supplement engineering controls;
- d) use of innovative technology must be considered, with preference given to permanent remedies;
- e) useable groundwaters must be returned to beneficial uses; and
- f) the selected remedy must be in compliance with California Environmental Quality Act (CEQA).

CEQA is required for discretionary approvals of projects approved by state and local agencies to avoid or reduce significant environmental impacts. Such projects may include issuance of permits, approval of Remedial Action Plans or Removal Action Workplans, Border Zone or



Hazardous Waste Property Determinations. If the project is subject to CEQA, DTSC will prepare appropriate documents to determine if the project will have a significant impact, and may prepare an Environmental Impact Report, or a Negative Declaration if the project will produce no significant effects. CEQA also requires disclosure to the public of the reasons for approval of any projects with significant environmental effects.

HOW CAN LUC AGREEMENT RESTRICTIONS BE MODIFIED OR TERMINATED?

Institutional controls selected as part of a CERCLA remedy may be modified or terminated through reopening the decision document, via a modification, explanation of significant differences, amendment, or revision of the decision document. In addition, DTSC has authority to modify or terminate the LUC Agreement at its discretion, without a public hearing, based upon evidence of changing site conditions. For example, if a new owner were to perform additional remediation at a site to remove contamination, DTSC could provide public notice and terminate the LUC Agreement. In some cases, the restriction as written in the LUC Agreement will contain a modification provision, e.g., no new groundwater wells shall be installed without written approval of the designated regulatory agency. Current statutes allow any aggrieved party to request that such determination be made in a public hearing; this process is described as follows:

Modification: If a property owner, or property occupant with the owner's consent, wishes to modify restrictions on a property, they may apply to DTSC for a written variance from the LUC Agreement provisions, giving their reasons to support that a variance should be granted. They must pay for DTSC costs relating to this application, and must prove that the variance will not cause or allow:

- 1) the creation or increase of significant present or future hazards to public health;
- 2) any significant diminution of the ability to mitigate potential or actual hazards;

- 3) any long-term increase in the number of humans or animals exposed to significant hazards which affect the public health, well-being, or safety.

Termination: If anyone wishes to terminate all or part of the restrictions on a property, they may apply to DTSC, giving their reasons to support termination. They must pay for DTSC costs relating to this application, and must provide sufficient evidence for DTSC to make a finding upon the following grounds:

- 1) The hazardous waste which caused the land to be restricted has since been removed or altered in a manner which precludes any significant existing or potential hazard to present or future public health.
- 2) New scientific evidence is available since the restriction concerning: a) the nature of the hazardous waste, or b) the geology or other physical environmental characteristics of the designated land.

In response to either of these applications, DTSC shall hold a hearing, and DTSC's director will make a determination based upon hearing testimony. Such determinations may be appealed in accordance with California Health and Safety Code, section 25233.

AVAILABILITY OF LIST OF RECORDED LUC AGREEMENTS

As a result of recent legislation (AB 871) effective January 1, 1999, DTSC must notify the planning and building department of each city, county, or regional council of governments of any recorded land use restriction. DTSC also now maintains a list of all recorded land use restrictions, including the street address or equivalent description of locations. [DTSC's LUC Agreements/deed restriction list](#) is updated monthly, and is available to the public via the Internet, by connecting to DTSC's home page at: www.dtsc.ca.gov, under the Site Mitigation Program Planning and Management Branch Section.

